No. 83-726

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

FIRST AMERICAN TITLE COMPANY OF SOUTH DAKOTA and FIRST AMERICAN TITLE INSURANCE COMPANY OF SOUTH DAKOTA,
Petitioner,

vs.

SOUTH DAKOTA LAND TITLE ASSOCIATION, SOUTH DAKOTA ABSTRACTERS' BOARD OF EXAMINERS, BLACK HILLS LAND AND ABSTRACT COMPANY, DENNIS O. MURRAY, SECURITY LAND AND ABSTRACT COMPANY, ESTATE OF GLEN M. RHODES, FALL RIVER COUNTY ABSTRACT COMPANY, CHARLES E. CLAY, CUSTER TITLE COMPANY, BETTY J. GOULD, HAAKON COUNTY ABSTRACT COMPANY, KEITH EMERSON, WAYNE ROE, CHARLES NASS, and STATE OF SOUTH DAKOTA,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. What action must be taken by a state legislature for antitrust immunity to attach to anticompetitive regulations of a state agency?

2. Whether state action immunity exempts from antitrust attack the regulations of a state agency preventing Petitioners from conducting their abstracting and title insurance business throughout the State of South Dakota, where the South Dakota legislature has never stated an intention to displace state-wide competition in the title services business.

3. Is there sufficient evidence in the record to support the factual finding of the lower courts that there was no conspiracy in the adoption of the challenged regulation and that the regulation was adopted to assure an adequate title search without any attempt to inhibit competition?

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Respondents Black Hills Land and Abstract Company and Dennis O. Murray respectfully pray that the Petition for a writ of certiorari filed by the Petitioners herein be denied.

With reference to the Petition, the statements regarding the Opinions Below, Jurisdiction, Statutory Provisions Involved and the accuracy of the Appendices attached to the Petition, are accepted.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case is generally accurate but these Respondents wish to point out certain specific additional items:

At page 6 of the Petition, the Petitioners quote from these Respondents' appellate brief in support of their contention that the state regulations have

created little monopolies and assert that these Respondents have admitted that fact. The Respondents' appellate brief speaks for itself but in fairness to the Court these Respondents would quote the entire sentence part of which was deleted by Petitioners:

> This pattern of county-wide abstract companies developed primarily because of the nature of the abstracting business in the State of South Dakota and because of the relatively small population in most of the counties of this state. Because of the small population and attendant small number of real estate transactions, it is ordinarily financially prohibitive for more then one abstract company to operate in a county. (underlining added)

One fact, critical to Petitioners, is repeatedly stated by Petitioners and ofttimes assumed by them. That is their contention that the State of South Dakota Abstract Board of Examiners' Regulations

require the abstracter to go through a "prohibitively expensive and laborious process" of constructing an abstract plant from an actual check of each page of each book of recorded instruments in the county register of deeds office and in no case allow the use of copy or film of the numerical index in the register's office. Petitioners offered no evidence below as to what this cost was and therefore have a record without basis as to their assumption that the process is prohibitively expensive or laborious. This very factual point was acknowledged by the United States Court of Appeals for the Eighth Circuit in their opinion contained at page 20 of the Petitioners' Appendix, footnote 9, where the Court stated:

See Brief of First American at 41 (where First American claims that the abstract plant requirement makes it "prohibitively expensive" to construct an abstract plant and that the effect of the regulation is to give "existing abstracters monopoly power over title services within their respective counties"). Apparently there was never any evidence offered at trial indicating exactly how costly it would be to assemble an abstract plant in accordance with ARSD § 20:36:04:01.

REASONS FOR NOT GRANTING THE WRIT

These Respondents suggest that there are three good reasons for not granting the writ as it relates to these Respondents:

1. The issue presented by the writ is not directed at either of these Respondents.

Petitioners state at page 16 of the Petition that they are not asking for any sweeping repudiation of statutory or reg-

ulatory provisions but rather seek a determination that the Respondents cannot enforce certain regulations which are therein specifically enumerated. The United States Court of Appeals for the Eighth Circuit specifically noted that this argument could be directed only against the State of South Dakota and the Board of Examiners and not against the private parties. The Eighth Ciruit stated in its opinion which may be found at page 21 of the Appendix of the Petition as follows:

> We also clarify that although First American's preemption argument appears to be directed against all defendants without differentiation, the only defendants against whom the argument necessarily can be directed are the State of South Dakota and the Board of Examiners. The state (in the form of its legislature) and the Board promulgated and enforce the challenged statute and regulations; consequently, it

> is they who would be enjoined from enforcing the challenged aspects of the regulatory scheme if First American were to prevail. We trouble to clarify these points because they are important to our ensuing discussion of the preemption/ state action issues.

Nowhere in the Petition have the Petitioners asserted a desire to challenge this portion of the opinion and judgment of the United States Court of Appeals for the Eighth Circuit. Therefore, it would appear by the position of Petitioners that the lower court judgment as well as the opinion of the United States Court of Appeals for the Eighth Circuit should be affirmed in all respects as to Respondents Black Hills Land and Abstract Company and Dennis O. Murray and any writ of certiorari, if issued, should not include these Respondents.

2. The legal issues presented by Petitioners are without factual basis.

Petitioners' entire legal argument requires the assumption of two facts, support for which is not contained in the record or was found contrary to Petitioners' position and sustained by the United States Court of Appeals for the Eighth Circuit.

First, in order to reach Petitioners' legal argument one must assume that the development of an abstract practice under the current regulations is "prohibitively expensive" and a "laborious process." As pointed out in the Statement of Case, supra, the Petitioners offered no evidence of this cost below and the Eighth Circuit noted this evidentiary deficiency on appeal. Additionally, as is noted by the United States Court of Appeals for the

Eighth Circuit in its opinion appearing at page 28 of Petitioners' Appendix, in 1973, Walter Linderman, President of Petitioners, became a licensed abstracter in Pennington County indicating that Linderman was able to fulfill the abstract plant requirement and thus compete on equal footing with the other licensed abstracter in Pennington County at that time, Theresa Burke.

A second fact critical to Petitioners' legal argument is the assumption contained at page 16 of the Petition that the abstracter regulations were developed for an unlawful horizontal division of territories. The United States Court of Appeals for the Eighth Circuit specifically dealt with this point and found that the evidence at trial produced an opposite factual conclusion:

The statutory requirement that a title insurance policy be signed by a licensed abstracter who, by regulation, has searched both his own title plant and the official county records (ARSD § 20:36:07:01) before countersigning ensures that someone whom the State of South Dakota deems qualified has performed a professional title search before title to property is transferred. Indeed, First American at oral argument appeared to have no quarrel with this policy, stating that it did not really object to the countersignature requirement, but only objected to the regulations which precluded Linderman, a licensed abstracter, from searching official county records outside of Pennington County and countersigning title insurance policies based on his search of those records. According to First American, the state's requirement that an abstracter have an abstract plant in each county in which the abstracter wishes to do business serves only anticompetitive ends. The State of South Dakota at trial justified its abstract plant requirement by introducing evidence which indicated the poor--in some cases illegible--condition of many counties' official records. Thus the

> state requires an actual check, in lieu of copies, of each page of the official county records in constructing an index for the abstract plant. (Appendix A--p. 29)

Petitioners have not contended that these evidentiary and factual conclusions by the two courts below were obvious and exceptional error or, indeed, error of any kind. Since this Court does not ordinarily review factual issues which have been sustained through two levels of appeal, the issuance of the writ in this case would not be appropriate.

3. There is no difference between the circuit courts as reflected in their decisions.

While the United States Court of Appeals for the Eighth Circuit clearly expressed its fundamental disagreement with the decisions of the Ninth and Fifth Circuits in Ronwin v. State Bar of Arizona,

686 F.2d 692 (9th Cir. 1981), cert. granted, 51 U.S. Law Week 3825 (May 16, 1983) (No. 82-1474); United States v. Texas State Board of Public Accountancy, 464 F.Supp. 400 (W.D. Tex. 1978), modified, 592 F.2d 919 (5th Cir.), cert. denied, 444 U.S. 925 (1979), there is as yet no real distinction in the decisions.

This case would not be an appropriate companion case to Ronwin, supra. Ronwin involves the dismissal of a complaint for failure to state a claim where the Ninth Circuit held only that in the absence of a clear articulation by the Arizona Supreme Court that it had adopted a particular grading policy, Ronwin should not have been denied the opportunity to prove that the grading policy was designed to limit competition among Arizona attorneys, as opposed to being

designed to insure that attorneys had the necessary qualifications. 686 F.2d at 698.

In this particular case, the Petitioners were never denied the opportunity to prove their assertions, the facts were simply found against them. As noted previously, the Petitioners presented no evidence as to the expense involved in the construction of an abstract plant and the State of South Dakota presented ample evidence in the record that the existing county indices, which Petitioners seek to use, were illegible and unreliable for a proper title search, thus, the requirement that a new abstract plant be constructed from an actual observation of the individual records rather than a Xerox of the existing indices. The South Dakota rule was to insure an adequate title check

not inhibit competition. In this particular case, Petitioners were defeated not by the law but on the facts.

Because this case involved a full trial on the merits rather than a dismissal of the complaint and since the Petitioners have alleged no factual error in the determination made by the courts below, there is no reason for the writ to issue as there is yet no conflict in this decision and the decisions of the Fifth and Ninth Circuits. This case is an unnecessary and inappropriate companion case and any potential future disagreement between the United States Court of Appeals for the Eighth Circuit and the Fifth and Ninth Circuits will be given necessary guidance by this Court's decision in Ronwin.

CONCLUSION

For the reasons above stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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